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<b>C.J., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 11-413</b>
	)	<b>Issued: October 21, 2011</b>
<b>U.S. POSTAL SERVICE, M.L. SELLARS</b>	)	
<b>PROCESSING &amp; DISTRIBUTION CENTER,</b>	)	
<b>San Diego, CA, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
ALEC J. KOROMILAS, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

On December 17, 2010 appellant, through his attorney, filed a timely appeal of the September 30, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

The issue is whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on April 30, 2008.

On appeal, counsel contends that appellant did not deviate from his business trip for personal reasons taking him out of the performance of duty on April 30, 2008. He further

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

contends that the medical evidence of record establishes a causal relationship between the claimed injury and the April 30, 2008 incident.

### **FACTUAL HISTORY**

On October 29, 2009 appellant, then a 59-year-old maintenance operations supervisor, filed a traumatic injury claim (Form CA-1) alleging that on April 30, 2008 he sustained a sore and achy right knee as a result of tripping on a sidewalk that was in disrepair. No caution tape or barricade was in place at the time of his injury.

In an October 29, 2009 e-mail, appellant described the April 30, 2008 incident to Lee A. Miller, a maintenance operations manager. He was in Detroit, Michigan for one week of training. On the third day of training, appellant ventured out to an automotive museum which was located eight blocks from his motel. At approximately 6:00 p.m. he walked along a sidewalk that was inlaid with bricks and uneven. Appellant tripped and fell onto his right knee. No lamp poles were in the area to illuminate the sidewalk. He picked himself up and felt pain in his knee. Appellant returned to his motel room and placed an ice pack on his knee. On the following day he informed Jodi Webb, a training coordinator for the employing establishment, about his injury. Appellant did not need to go to the hospital at that time. He returned to San Diego, California and sought medical treatment for his sore right knee from his family physician during the first week of June 2008. The physician diagnosed a sprained knee. Appellant did not mention an on-the-job injury to the physician because the physician did not handle workers' compensation cases. On June 7, 2008 he informed his manager about his right knee injury. Appellant's pain lessened and he mostly did not pay particular attention to his knee. He stated that, approximately one month ago, strong winds in his area caused the metal roof of his garage to lift off. Appellant ascended a ladder to try to hold the metal roofing material down. As he stood on the ladder he began to feel tightness in his right knee. Appellant descended the ladder carefully and he continued to experience pain in his knee. The following day he could not squat down without feeling pain in his knee. Manny Mutec, an employee in the employing establishment's injury compensation office, advised appellant to seek treatment from his family physician. On October 27, 2009 his physician refused to treat him since he did not handle workers' compensation cases. The physician suggested that appellant seek help from his injury compensation office. Appellant completed a (Form CA-1) on October 29, 2009 at the direction of the employing establishment injury compensation staff.

A June 7, 2008 e-mail indicated that appellant advised Martin L. Graham, a manager, about his right knee injury that he sustained as a result of his fall while on training in Detroit on April 29, 2008 and subsequent medical treatment. A physician performed x-rays of his right knee and advised that there was no permanent damage. However, time was needed to heal his damaged nerves. Appellant informed Mr. Graham that he did not inform his physician that he sustained a work-related injury.

On the reverse of the CA-1 form, the employing establishment stated that it received notice of appellant's injury on October 29, 2009. It controverted his claim on the grounds that it was not filed within 30 days of the date of injury.

By letter dated November 6, 2009, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It requested that he complete and return an accompanying factual questionnaire and submit medical evidence. Also, on November 6, 2009 OWCP requested that the employing establishment complete an enclosed factual questionnaire regarding appellant's claim.

In an OWCP questionnaire dated November 12, 2009, appellant stated that he last performed official duty at the employing establishment in San Diego on February 12, 2009. He was traveling between a restaurant and museum at the time of injury. The purpose of the trip was to eventually arrive at his hotel. This was the most direct route.

In a November 13, 2009 letter, appellant stated that upon his return to San Diego he informed Mr. Miller about his injury. He did not complete a Form CA-1 at the time of injury because he and Mr. Miller agreed to wait to see if his knee would heal.

Medical reports dated May 30, 2008 and March 4 and October 27, 2009 from Dr. Michael D. Walker, an attending family practitioner, obtained a history that appellant struck his right knee when he fell on a sidewalk. He listed his findings on physical and diagnostic examination. Dr. Walker advised that appellant had a right knee contusion. He also suffered from depression and was in an unspecified anxiety state.

In a November 25, 2009 letter, Mr. Miller controverted appellant's claim. He contended that neither he nor any other managers noted any episodes or hint of knee pain exhibited by appellant upon his return to work following the alleged injury. Appellant seemed to be getting along without a problem. Mr. Miller noted that appellant had not worked since early February 2009 due to stress and contended that the alleged injury occurred off the clock. He further contended that the medical evidence did not establish a causal relationship between the April 30, 2008 incident and claimed injury.

In an OWCP questionnaire dated November 25, 2009, Mr. Miller stated that the distance between appellant's hotel and the automotive museum was eight blocks. Appellant was on the most direct route from his hotel to the place he planned to visit.

On December 6, 2009 Mr. Miller advised OWCP that appellant went to the automotive museum on his own time after he completed training on April 30, 2008.

In a December 7, 2009 decision, OWCP denied appellant's claim that he sustained an injury in the performance of duty on April 30, 2008. It found that his claim was not timely filed because he did not report the injury within 30 days of its occurrence. OWCP further found that the evidence did not establish that appellant was engaged in any employment-related business while on his way to an automotive museum on the date of injury and that his training was completed at the time. It further found that the museum was not a destination at which he was expected to be in connection with his employment. Additionally, OWCP found that appellant did not explain how his right knee condition was related to the April 28, 2008 incident and not ascending his ladder in 2009.

On December 20, 2009 appellant requested an oral hearing, which he ultimately changed to a request for review of the written record.<sup>2</sup>

An April 22, 2010 progress note from Dr. Heywood W. Zeidman, a Board-certified psychiatrist, prescribed medication to treat appellant's sleep and emotional conditions.

In a June 9, 2010 decision, an OWCP hearing representative affirmed the December 7, 2009 decision. He accepted that the April 30, 2008 incident occurred as alleged and found that appellant's claim was timely filed. The hearing representative, however, found that appellant did not sustain an injury in the performance of duty as he deviated from the normal duties of his travel assignment for purposes of personal entertainment when he went to a museum.

By letter dated September 2, 2010, appellant, through his attorney, requested reconsideration. Counsel stated that, after the third day of training, appellant and his fellow trainees went to a restaurant for dinner. After dinner, appellant walked by a museum which was located a few blocks from his hotel on his return to his hotel. Counsel contended that appellant did not visit the museum. Appellant continued on a direct path from the restaurant to his hotel without any deviation. He only mentioned the museum because it was located near his fall.

In a July 1, 2010 letter, appellant contended that he did not deviate from his normal path when he walked from the restaurant to his motel by way of a museum. The museum was on his way to the motel and it was the closest reference point to the site of his injury. Appellant stated that he did not enter the museum, but instead, continued to his motel to apply an ice pack on his injury.

In reports dated June 9 and August 23, 2010, Dr. John B. Dorsey, a Board-certified orthopedic surgeon, obtained a history of the April 30, 2008 incident and appellant's medical, social, family and occupational background. He listed his findings on physical examination and diagnosed internal derangement of the right knee. Dr. Dorsey advised that appellant remained on temporary total disability for six weeks.

In a September 30, 2010 decision, OWCP denied modification of its prior decisions, finding that appellant was not in the performance of duty at the time of his injury on April 30, 2008.

### **LEGAL PRECEDENT**

FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of his duty.<sup>3</sup> The phrase sustained while in the performance of his duty is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the

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<sup>2</sup> By letter dated March 17, 2010, appellant's attorney requested that the Branch of Hearings and Review cancel a scheduled telephone hearing because appellant was unavailable to participate due to a family obligation. On April 19, 2010 counsel requested a review of the written record by an OWCP hearing representative.

<sup>3</sup> 5 U.S.C. § 8102(a).

course of employment.<sup>4</sup> Arising in the course of employment relates to the elements of time, place and work activity.<sup>5</sup> An injury is said to arise in the course of employment when it takes place within the period of the employment, at a place where the employee reasonably may be and while they are fulfilling their duties or are engaged in doing something incidental thereto.<sup>6</sup> Arising out of employment relates to the causal connection between the employment and the injury claimed.<sup>7</sup>

Under FECA, an employee on travel status or a temporary-duty assignment or special mission for his employer is in the performance of duty and, therefore, under the protection of FECA 24 hours a day with respect to any injury that results from activities essential or incidental to his special duties.<sup>8</sup> Examples of such activities are eating,<sup>9</sup> returning to a hotel after eating dinner and engaging in reasonable activities within a short distance of the hotel where the employee is staying.<sup>10</sup> However, when a claimant voluntarily deviates from such activities and engages in matters, personal or otherwise, which are not incidental to the duties of his or her temporary assignment, they cease to be under the protection of FECA. Any injury occurring during these deviations is not compensable.<sup>11</sup> Examples of such deviations are visits to relatives or friends while in official travel status,<sup>12</sup> visiting nightclubs and bars,<sup>13</sup> skiing at a location 60 miles from where an employee is undergoing training<sup>14</sup> and taking a boat trip during nonworking hours to view a private construction site.<sup>15</sup>

In determining whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the

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<sup>4</sup> *R.A.*, 59 ECAB 581 (2008); *Bernard D. Blum*, 1 ECAB 1 (1947).

<sup>5</sup> *V.O.*, 59 ECAB 500 (2008); *R.S.*, 58 ECAB 660 (2007).

<sup>6</sup> *L.K.*, 59 ECAB 465 (2008); *D.L.*, 58 ECAB 667 (2007).

<sup>7</sup> See *Charles Crawford*, 40 ECAB 474 (1989) (the phrase arising out of and in the course of employment encompasses not only the concept that the injury occurred in the work setting, but also the causal concept that the employment caused the injury); see also *Robert J. Eglinton*, 40 ECAB 195 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

<sup>8</sup> *Ann P. Drennan*, 47 ECAB 750 (1996); *Janet Kidd (James Kidd)*, 47 ECAB 670 (1996); *William K. O'Connor*, 4 ECAB 21 (1950).

<sup>9</sup> *Michael J. Koll, Jr.*, 37 ECAB 340 (1986); *Carmen Sharp*, 5 ECAB 13 (1952).

<sup>10</sup> *Ann P. Drennan*; *Janet Kidd (James Kidd)*, *supra* note 8; *Theresa B.L. Grissom*, 18 ECAB 193 (1966).

<sup>11</sup> *Karl Kuykendall*, 31 ECAB 163 (1979).

<sup>12</sup> *Ethyl L. Evans*, 17 ECAB 346 (1966); *Miss Leo Ingram*, 9 ECAB 796 (1958); *George W. Stark*, 7 ECAB 275 (1954).

<sup>13</sup> *Conchita A. Elefano*, 15 ECAB 373 (1964).

<sup>14</sup> *Karl Kuykendall*, *supra* note 11.

<sup>15</sup> *Mattie A. Watson*, 31 ECAB 183 (1979).

employee's work assignment or represented such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her employment.<sup>16</sup>

### ANALYSIS

OWCP accepted that at 6:00 p.m. on April 30, 2008 appellant sustained a right knee injury on a sidewalk in Detroit, Michigan where he was attending training. There is no factual evidence of record indicating that appellant did not sustain the claimed injury as alleged. The Board finds, therefore, that the April 30, 2008 incident occurred at the time, place and in the manner alleged. It must now be determined whether that incident occurred in the performance of duty.

On the evening of April 30, 2008 appellant had dinner with fellow trainees at a restaurant. After finishing dinner he walked back to his motel. Appellant tripped while walking on an uneven sidewalk and sustained a right knee contusion. Initially, he contended that his injury occurred as he walked from the restaurant to an automotive museum which was located eight blocks from his motel. Appellant stated that he eventually planned to return to his motel following his museum visit. Subsequently, he contended that he did not visit the museum and that his injury occurred on a direct path from the restaurant to his motel without any deviation. Appellant stated that he only previously mentioned the museum because it was located near the site of his fall. The Board has held that contemporaneous evidence is entitled to greater probative value than later evidence.<sup>17</sup> Appellant's later statement does not clearly explain why he changed his prior description of the April 30, 2008 incident. Further, there is no factual evidence in the record to corroborate his contention that he did not visit the museum during his walk from the restaurant to his motel. The Board finds, therefore, that appellant was not engaged in normal, ordinary and natural activities reasonably incidental to his temporary-duty assignment but rather had undergone a temporary, personal diversion. Appellant's actions away from his motel constitute a personal deviation not arising out of the necessity of his employment.<sup>18</sup> Although returning to his motel from the restaurant, the Board has held that an injury may not be compensable even though an employee is returning to his or her temporary residence at the time of injury or death.<sup>19</sup> Appellant's injury on April 30, 2008 was not reasonably incidental to his temporary duty status or a recreational activity covered by FECA. The Board finds, therefore, that as he had removed himself from the course of employment at the time of injury, OWCP properly denied his claim. As appellant has not established the factual aspect of his claim, it is not necessary to address the medical evidence.<sup>20</sup>

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<sup>16</sup> *Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

<sup>17</sup> *See Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971).

<sup>18</sup> *Ronelle Smith*, 47 ECAB 781 (1986); *Lawrence J. Kolodzi*, 44 ECAB 818 (1993).

<sup>19</sup> *See Ronelle Smith, id.*; *Conchita A. Elefano*, *supra* note 13. *See William T. Bodily*, 52 ECAB 509 (2001). In *Bodily*, the employee was robbed at gunpoint away from his hotel under unclear circumstances. The Board found that he had deviated from employment and that the deviation did not cease until the police arrived to drive him back to his hotel.

<sup>20</sup> *Alvin V. Gadd*, 57 ECAB 172 (2005).

On appeal, appellant contends that he sustained an injury in the performance of duty on April 30, 2008 as he did not deviate from his business trip for personal reasons. For reasons stated above, the evidence is insufficient to establish that he was in the performance of duty at the time of his fall on April 30, 2008. Further, in light of the Board's finding, it is not necessary to address appellant's contention on appeal that the medical evidence is sufficient to establish a causal relationship between his right knee condition and the April 30, 2008 incident.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty on April 30, 2008.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 30, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 21, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board